Supreme Court, U.S.
FILED
MAR 11 2002

(2)

No. 01-1148

IN THE

# Supreme Court of the United States

LARRY WOLF; PETER NM HUGGER; FRED S. O'BRIEN; and MAURICE D. MYERS,

*Petitioners,*

*v.*

ROBERT L. COLEMAN; MICHAEL A. GEORGE; ALAN CAREY; BERNARD A. YANNETTI, JR.; MATTHEW J. O'BRIEN; BERWICK TOWNSHIP; and KEVIN WILSON,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED[1]

1. Whether the District Court and Court of Appeals, in its review, properly dismissed Count I of the Complaint, alleging a Fourth Amendment violation, for failure to state a claim where there was no direct attack on the validity of the applicable search warrant nor was there any allegation that the officer preparing the warrant application deliberately falsified information or included information in reckless disregard of its truth or falsity?

2. Whether the District Court and Court of Appeals, in its review, properly dismissed Petitioners' Complaint for failure to state a § 1983 conspiracy, where Plaintiffs' "ambiguous allegations and vague inferences" failed to specifically allege the necessary elements of a conspiracy?

3. Whether the District Court and Court of Appeals, in its review, properly dismissed Count II of the Complaint for failure to state a substantive due process or First Amendment retaliation claim, particularly where Petitioners failed to alleged a violation of a protected property interest?

4. Whether the District Court and Court of Appeals, in its review, properly determined that Count III of Petitioners' Complaint failed to state a claim for a § 1983 malicious prosecution based on the Fourth Amendment, where the Complaint failed to allege any pretrial deprivation of their personal liberty worthy of protection afforded by the Fourth Amendment?

5. Whether the District Court and Court of Appeals, in its review, properly determined that Count IV of Petitioners' Complaint failed to state a claim upon which relief could be granted, particularly where there was no discernible due process violation?

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1. It should be noted that contrary to Supreme Court Rule 24(a) the questions raised in Petitioners' "Questions Presented" are substantively different from those mentioned in the body of their Argument.

6. Whether the District Court and Court of Appeals, in its review, properly determined that Respondent George was entitled to absolute prosecutorial immunity?

7. Whether the District Court and Court of Appeals, in its review, properly determined that Detective Wilson was entitled to qualified immunity where it is clear that he could have reasonably believed that his conduct did not violate Petitioner, Wolf's rights?

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## COUNTERSTATEMENT OF THE CASE

Initially, contrary to Supreme Court Rule 24(g), Petitioners completely fail to make appropriate citations to the facts of record in their Statement of the Case. More importantly, Petitioners now include facts not of record below, which are not appropriate for consideration by this Honorable Court. Specifically, Petitioners allege, in part, the following facts not of record: Mr. Coleman approached Petitioner, Wolf and asked him to "betray his client"; Wolf was told not to share information with his clients; Mr. Wolf reported Coleman's actions to his clients and, ". . . the response was to have Wolf record a judgment for his fees, a perfectly legal process for which they openly voted"; Wolf was politically neutral and was not involved in any political disagreements with any persons or factions; it was decided that George should not bring the charges against the authority member Petitioners as D.A., because it would frighten the official community to have the D.A. initiate "Sunshine Act" charges against an elected official; Coleman called the local newspaper and scheduled a reporter to appear at the search of Wolf's office; Wolf retained the services of one of Pennsylvania's more prominent ethics lawyers who called Mr. George and explained the state of the law and that it was plain that Mr. Wolf was not only not subject to the law, but that he had done nothing wrong; "no discovery was conducted because Respondents wished in certain cases to await the decision of the District Court on their Motions to Dismiss . . . and because some defense counsel were too busy." (See Petition, pp. 2-6).

Conversely, the facts of record as alleged in the Complaint and outlined in the respective District Court and Appellate Court Opinions are set forth below.

On May 22, 2000, Plaintiff/Appellants/Petitioners, Larry Wolf, Peter Hugger, Fred S. O'Brien and Maurice D. Myers instituted this purported civil rights action in order to

recover for alleged violations of their federally protected rights in an action against Robert L. Coleman, Adams County District Attorney Michael A. George, Alan Carey, Adams County Assistant District Attorney Bernard A. Yannetti, Jr., Detective Kevin Wilson of the Borough of Gettysburg Police Department, Adams County Detective Matthew J. O'Brien and Berwick Township. Petitioners alleged generally that the Defendants/Respondents conducted an unlawful search of Larry Wolf's law office (Count I); that Defendants/Respondents refused to pay Wolf's legal fees for his work as a part-time Solicitor for the Berwick Township Municipal Authority (Count II); and that Defendants/ Respondents engaged in the malicious prosecution of the remaining Petitioners, O'Brien, Myers and Hugger (Count III). In addition, Petitioners assert both federal and supplemental state law claims for conspiracy (Counts IV and V). (App. 8a).

Petitioners, Peter Hugger, Fred S. O'Brien and Maurice D. Myers are former members of the Berwick Township Municipal Authority (hereinafter "BTMA"). (App. 9a; Comp. at ¶1).[2] Petitioner, Larry Wolf allegedly is a former part-time Solicitor for BTMA. (App. 9a; Comp. at ¶13). The Complaint is based on three separate incidents. Initially, Mr. Wolf alleges that he was subject to an unlawful search and seizure, and also alleges that Defendants deprived him of attorney's fees. (App. 10a). Also, Mr. Hugger, Mr. O'Brien and Mr. Myers seek damages for alleged malicious prosecution.

In 1995, a dispute allegedly arose between Berwick Township Supervisors and the BTMA regarding a sewer project. (App. 10a; Comp. at ¶14). Purportedly, in June 1997, Mr. Coleman, a Berwick Township Supervisor, called

2. References to the Appendix attached to the Petition for a Writ of Certiorari are set forth as "App. __"; references to the Plaintiffs' Complaint are set forth as "Comp. at __."

attorney Wolf and told him that the Township would not pay his legal fees unless Wolf, ". . . used his influence to support the Township's position with regard to the aforementioned sewer project." (Comp. at ¶17). In August 1997, the Township allegedly acted to take over the sewer project presumably by way of mandamus action. (Comp. at ¶19). Wolf was directed by the BTMA to defend the mandamus action on behalf of the BTMA. (Comp. at ¶19). The Township prevailed in the mandamus action early in 1998. (Comp. at ¶19).

Allegedly, the Township is required to pay Mr. Wolf's legal fees. (Comp. at ¶17). The Complaint alleges that Wolf's attorney's fees totaled $11,376.00, including defense of the mandamus action. (Comp. at ¶¶19, 20). This dispute, which is actually a billing dispute, purportedly forms the basis for Count II of Plaintiffs' Complaint, alleging a violation of Mr. Wolf's First and Fourteenth Amendment rights. (App. 10a).

Meanwhile in July 1997, the Complaint alleges that the Township authorized Defendant, Alan Carey to file a private criminal Complaint against Hugger, O'Brien and Myers for violations of the Sunshine Act. (App. 11a; Comp. at ¶21). After a District Justice hearing, the Plaintiffs were found guilty of these violations. (App. 11a; Comp. at ¶22). However, Plaintiffs/Petitioners appealed to the Common Pleas Court of Adams County and eventually, in the spring of 1999, the charges were dropped by Mr. George. (Comp. at ¶¶23, 24). Allegedly, this was done only after Defendants, George, the District Attorney, Coleman, Carey and the Township offered to drop the charges if Plaintiffs donated $50 to a charity. (Comp. at ¶25). When the Plaintiffs refused, Defendants allegedly asked Plaintiffs to resign. (Comp. at ¶25). At the time, Defendants purportedly offered to pay Mr. Wolf's legal fees. (Comp. at ¶25). In the fall of 1999, it was announced that the charges had been *nolle prossed* because they, ". . . served no use for public purpose." (Comp. at ¶24). As the District

Court observed, the initial charges are those alleged by Plaintiffs in Count III of their Complaint to have been maliciously brought against them in the first place. (App. 11a).

On May 22, 1998, Defendants, Yannetti, an Assistant District Attorney, O'Brien and Wilson allegedly searched Mr. Wolf's office, and downloaded files from his computer onto computer disks pursuant to a search warrant obtained by the Adams County District Attorney's Office. (Comp. at ¶¶27, 28 and 31). ADA Yannetti reportedly told Mr. Wolf that District Attorney George sent him to Wolf's office. (Comp. at ¶29). The search was made pursuant to a search warrant, although the Complaint alleges that the probable cause Affidavit in support of the search warrant was baseless. (Comp. at ¶31). The warrant was issued by District Justice Mervin L. Dubs on May 22, 1998.[3] County Detective M.J. O'Brien was the affiant on the Affidavit, which Affidavit set forth that: Larry Wolf was the Solicitor for the BTMA; Wolf filed a civil action against the BTMA seeking payment for his legal representation of the BTMA; and that Wolf filed an Answer with confession of judgment on behalf of the BTMA admitting the allegations in the Complaint. (See Warrant and Affidavit).

Respondent, Detective Kevin Wilson of the Borough of Gettysburg Police Department executed an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746 setting forth his personal knowledge of the facts material to the dispositive motion filed below.[4] Essentially, Detective Wilson assisted Detective O'Brien of the Adams

3. See Search Warrant and Affidavit contained in Appendix attendant to Appellants' Brief in the Third Circuit Court of Appeals hereinafter referred to as "Warrant and Affidavit").

4. The Unsworn Declaration of Detective Wilson is contained in Appendix attendant to Appellants' Brief on appeal in the Third Circuit Court of Appeals and hereinafter is referred to as "Wilson declaration".

County District Attorney's Office with the execution of a search warrant at the law office of Larry Wolf located at 215 Broadway, Hanover Borough, York County, Pennsylvania. (Wilson declaration, ¶2). Wilson's declaration further attests to the fact that he had no involvement with either the preparation of the search warrant and/or the Affidavit or with the presentation of those documents to District Justice Dubs. (Wilson declaration, ¶4). In accordance with the search warrant issued by District Justice Dubs, the Adams County District Attorney's office requested that Wilson obtain files pertaining to the Berwick Township Municipal Authority from Attorney Wolf's office computer. Detective Wilson obtained nine files from the C Drive of the office computer at the premises located at 215 Broadway, Hanover, PA. (Wilson declaration, ¶5).

In Count I of the Complaint, Larry Wolf seeks damages for alleged violations of his Fourth Amendment rights. In Count II, Larry Wolf seeks damages for alleged violations of due process and First Amendment rights pursuant to 42 U.S.C. § 1983. In Count III, Petitioners, O'Brien, Myers and Hugger seek redress for deprivation of their Fourth Amendment rights (malicious prosecution claim). In Count IV, Myers, Hugger and O'Brien allege conspiracy to deprive them of their due process rights. In Count V, all Plaintiffs allege a state law civil conspiracy claim. The individual Petitioners seek damages, including, but not limited to fees, costs, attorney's fees and such other relief as the District Court deemed appropriate.

All Defendants/Respondents moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6). On November 13, 2000, the United States District Court for the Middle District of Pennsylvania granted the Motions to Dismiss in their entirety. On November 17, 2000, Plaintiffs/Appellants filed a Notice of Appeal from that Order. On October 24, 2001, the United States District Court of Appeals for the Third Circuit affirmed the District Court's Order dismissing

Plaintiffs/Petitioners' Complaint in its entirety. Petitioners then filed a Petition for Rehearing and for En Banc Rehearing, which was denied on December 7, 2001 by the Third Circuit Court of Appeals.

On January 22, 2002, Petitioners filed a Petition for a Writ of Certiorari. Respondents, Robert L. Coleman, Michael A. George, Alan Carey, Bernard A. Yannetti, Jr., Matthew J. O'Brien, Kevin Wilson and Berwick Township now file this Brief in Opposition to the Petition for Writ of Certiorari, pursuant to Supreme Court Rule 15.

## SUMMARY OF THE ARGUMENT

Plaintiffs/Petitioners, Larry Wolf, Peter Hugger, Fred S. O'Brien and Maurice D. Myers instituted this purported civil rights action against Robert L. Coleman, Adams County District Attorney Michael A. George, Alan Carey, Adams County Assistant District Attorney Bernard A. Yannetti, Jr., Detective Kevin Wilson of the Borough of Gettysburg Police Department, Adams County Detective Matthew J. O'Brien and Berwick Township. Petitioners alleged generally that the Defendants/Respondents conducted an unlawful search of Larry Wolf's law office (Count I); that Defendants/Respondents refused to pay Wolf's legal fees for his work as a part-time Solicitor for the Berwick Township Municipal Authority (Count II); and that Defendants/ Respondents engaged in the malicious prosecution of the remaining Petitioners, O'Brien, Myers and Hugger (Count III). In addition, Petitioners assert both federal and supplemental state law claims for conspiracy (Counts IV and V). All Defendants/Respondents moved to dismiss the Complaint pursuant to F.R.C.P. 12(b)(6). On November 13, 2000, the United States District Court for the Middle District of Pennsylvania granted the Motions to Dismiss in their entirety. Similarly, on October 24, 2001, the United States

Court of Appeals for the Third Circuit affirmed the District Court's Order dismissing Plaintiffs/Petitioners' Complaint in its entirety.

Specifically, the District Court and the Court of Appeals in its review, properly determined that Petitioner, Wolf failed to state a claim for a Fourth Amendment violation based on the alleged improper search of his office. There was no direct attack on the validity of the applicable search warrant, nor was there any allegation that the officer preparing the warrant application deliberately falsified information or included information in reckless disregard of its truth or falsity.

Similarly, the lower courts properly dismissed Petitioners' Complaint for failure to state a claim for a § 1983 conspiracy. Initially, a § 1983 conspiracy claim is not actionable where this no actual § 1983 violation. In addition, Petitioners' Complaint failed to specifically allege the necessary elements of a conspiracy.

The District Court and the Court of Appeals, in its review, also properly dismissed Count II of the Complaint, in which Mr. Wolf sought to recover unpaid professional fees. Simply, there is no right to receive and/or recover professional fees, which is guaranteed by the Constitution or a federal law. In other words, Petitioners fail to allege a violation of a protected property interest. Count II also fails to state a First Amendment retaliation claim where Mr. Wolf failed to demonstrate that his purported constitutionally protected conduct was a "substantial" or "motivating factor" in the alleged retaliation.

Petitioners, O'Brien, Myers and Hugger's alleged malicious prosecution claim based on the Fourth Amendment and identified as Count III also was properly dismissed by the District Court and Appellate Court, in its review, where the Complaint failed to allege any pretrial deprivation of their personal liberty worthy of protection afforded by the Fourth Amendment.

Count IV of the Complaint, which purported to state a cause of action for deprivation of due process and First Amendment rights by Petitioners, O'Brien, Hugger and Myers was similarly and properly dismissed. In this regard, the District Court and Appellate Court, in its review, properly determined that there was no discernable due process violation and Plaintiffs failed to demonstrate that their alleged protected activity was a substantial or motivating factor in any alleged retaliation by Defendants. The District Court and the Court of Appeals, in its review, properly exercised its discretion in declining to exercise supplemental jurisdiction over Plaintiffs' supplemental state law claim for a civil conspiracy.

Finally, the District Court and the Appellate Court, in its review, properly determined that Respondents, George and Wilson were entitled to immunity. Specifically, Respondent, George, as Adams County District Attorney is entitled to absolute prosecutorial immunity for his role in prosecuting the violations of the Sunshine Act and in his application for the relevant search warrant. Similarly, Detective Wilson is entitled to qualified immunity for his role in the search of Mr. Wolf's office in that it is clear that Wilson could have reasonably believed his conduct did not violate Wolf's rights.

Although Petitioners apparently contend that a Writ of Certiorari should issue in this case because the District Court and the Court of Appeals, in its review, somehow misapplied the law on prosecutorial immunity and also apparently departed from clearly established Third Circuit and United States Supreme Court rulings, the District Court and the Third Circuit, in its review, properly applied established rules of law in this case, including employing the correct standards of review. Petitioners have failed to identify any improper or inaccurate statement of the relevant law utilized by the lower courts, and/or have failed to demonstrate how, in fact, any properly stated rule of law was misapplied in the instant

case. On this basis, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari, thereby affirming the Court of Appeals' Order granting Respondents' Motions to Dismiss.

## REASONS FOR DENYING THE WRIT

Petitioners, Larry Wolf, Peter N. Hugger, Fred S. O'Brien and Maurice D. Myers maintain that the Court of Appeals erred in affirming the District Court's Order granting Respondents' Motions to Dismiss in their entirety. Although Petitioners have failed to include a summary of the argument as required by Supreme Court Rule 24(h), Petitioners apparently contend that a Writ of Certiorari should issue in this case because the District Court, and the Court of Appeals in its review, somehow misapplied the law on prosecutorial immunity, and, also, apparently, ". . . departed from clearly established Third Circuit and U.S Supreme Court rulings . . ." (Petition, pp. 5, 14). Petitioners also contend that they sufficiently identified federally guaranteed rights, which Respondents purportedly violated, particularly with regard to Petitioners, Hugger, Matthew O'Brien and Myers' First and Fourth Amendment rights. (Petition, p. 5).

The United States Court of Appeals, Third Circuit, properly affirmed the District Court's ruling dismissing Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief can be granted. Furthermore, the District Court and the Court of Appeals, in its review, properly determined that Defendant/Respondent, George is absolutely immune for his role in regard to the search warrant and search, and from Plaintiffs' § 1983 claims of malicious prosecution. Moreover, both Courts properly determined that Detective Wilson is entitled to qualified immunity with regard to the claims alleged in Count I of Plaintiffs' Complaint relating to the search of Mr. Wolf's office. Additionally, the Third Circuit properly applied established rules of law in this case, including employing the correct standards of review. As such,

there is no basis, pursuant to Supreme Court Rule 10, upon which to issue a Writ of Certiorari in the instant case.

## A. LEGAL STANDARD

Petitioners repeatedly claim that the lower courts somehow misapplied the proper standards of review in their review of the dispositive motion below. While Petitioners dispute the application of the standard of review in that its application yielded the dismissal of their Complaint, it is undisputed that the proper standards of review were employed by both the District Court and the Appellate Court as set forth below. Moreover, even a cursory reading of the Opinions filed below demonstrates that both the District Court and the Appellate Court applied properly stated rules of law in their determination of the instant case.

Rule 12(b)(6) of the F.R.C.P. provides that a Defendant may move to dismiss a Complaint for failure to state a claim upon which relief can be granted. The Court must accept as true all factual allegations set forth in the Complaint as well as all reasonable inferences that can be drawn from them. *Nami v. Fauver*, 82 F.2d 63, 65 (3d Cir. 1996). An action should be dismissed pursuant to F.R.C.P. 12(b)(6) where it is certain no relief could be granted under any set of facts that could be proved. *Markowitz v. Northeast Land Co.*, 906 F.2d 100 (3d Cir. 1990). Generally, only allegations of the Complaint, exhibits attached to the Complaint and matters of public record are considered on a Motion to Dismiss; however, a document appended to the Defendants' Motion to Dismiss may be considered if it is concededly authentic and the Complaint is based on that document, thereby preventing a Plaintiff from avoiding proper dismissal by simply failing to attach to the Complaint a dispositive document on which it relied. *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) *cert. denied*, 510 U.S. 1042 (1994).

The standard of review for the Court of Appeals was plenary. *Nami v. Fauver*, 82 F.3d at 65; *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989). On review of a dismissal for failure to state a claim, the Court of Appeals must determine whether Appellants are entitled to relief under any reasonable reading of the pleadings, assuming the truth of all factual allegations in the Complaint, and all reasonable inferences therefrom. *Alexander v. Whitman*, 114 F.3d 1392, 1398 (3d Cir. 1997); *Martin v. Dana Corp.*, 114 F.3d 421, 423 (3d Cir. 1997).

## B. THE SEARCH OF WOLF'S OFFICE DID NOT VIOLATE THE FOURTH AMENDMENT

In Count I, Petitioner, Wolf alleges that he was deprived of his Fourth Amendment rights and also alleges a conspiracy to deprive him of those rights. Specifically, Wolf alleges that there was no probable cause to support the search of his office. However, pursuant to 42 U.S.C. § 1983, a Plaintiff must allege and prove that Defendants deprived him of a right secured by the Constitution and laws of the United States. Further, liability under § 1983, ". . . is personal in nature and can only follow personal involvement in the alleged wrongful conduct, shown through specific allegations of personal direction or of actual knowledge and acquiescence." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

Initially, although Wolf has brought this Count against Defendant, Coleman, the Complaint is utterly devoid of any factual allegation, which would implicate his participation in the conduct of which Mr. Wolf complains. The only allegation with regard to a deprivation of Mr. Wolf's Fourth Amendment rights attached to Mr. Coleman is that Mr. Coleman knew of the plan to search attorney, Wolf's office and also allegedly tipped off the Press with regard to the same. There is absolutely no allegation that Mr. Coleman

participated in providing information to a law enforcement officer in order to assist in the preparation of a probable cause affidavit and ultimately a search warrant for Wolf's office.

The Complaint identifies only Defendants, Yannetti, O'Brien and Wilson as the individuals who, in fact, searched Wolf's office. (Comp. at ¶28). Wolf alleges only that Yannetti, an Assistant District Attorney was sent to search Wolf's office by District Attorney George. (Comp. at ¶29). Moreover, although Wolf references the fact that his private counsel, ". . . pointed out to Mr. George that the law clearly demonstrated that the probable cause affidavit he had prepared for the bogus search warrant used was baseless," there is absolutely no allegation that this was not a facially valid warrant and/or that Mr. Yannetti and other officers were aware that it was secured through purportedly bad information.

Pursuant to *Franks v. Delaware*, 438 U.S. 154, 155-6 (1978), there is a two-part test to be satisfied by a Plaintiff asserting a § 1983 claim which challenges the validity of a search warrant on probable cause grounds. (App. 13a-14a). The Plaintiff must prove by a preponderance of the evidence the following:

> (1) That the Affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and
>
> (2) That such statements or omissions are material, or necessary, to the finding of probable cause.

*Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997) (citations omitted).

There was no direct attack on the validity of this warrant, nor was there any allegation that the officer preparing the

warrant application, ". . . either deliberately falsified information or included information in reckless disregard of its truth or falsity." *See Franks v. Delaware*, 438 U.S. 154, 165-6 (1978). As the District Court properly observed, Wolf does not assert that the Affiant, Defendant, O'Brien made any misrepresentations that were material to the finding of probable cause. Rather, the Plaintiffs', ". . . only specific claim on this matter is that the 'probable cause affidavit [George] had prepared for the bogus search warrant used, was baseless.' " (App. 14a-15a; Comp. at ¶7). The District Court properly deemed this assertion baseless in and of itself. (App. 15a).

In any case, even if Petitioners' argument that Wolf's actions did not establish a violation of the conflict of interest laws were true, although such is denied by Respondents and belied by the District Court's analysis as set forth above, such does not alter the *Franks'* requirements to challenge an affidavit of probable cause at the outset. Simply, as the Third Circuit properly observed, ". . . Appellants failed to allege O'Brien, the affiant, made any false statements, misrepresentations, or omissions that were material or necessary to the probable cause finding." (App. 3a).

Since Petitioners' Complaint failed to contain any such allegation, the District Court, and the Third Circuit in its review, properly determined that Petitioners' failure to comply with the *Franks'* standard necessitated the dismissal of this claim. (App. 3a, 15a). Petitioners have failed to identify any improper or inaccurate rule of law utilized by the lower courts, and/or to establish how, in fact, any properly stated rule of law was misapplied in this instance. On this basis, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

## C. COUNT I OF PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM FOR § 1983 CONSPIRACY

To state a claim for conspiracy for purposes of § 1983, Plaintiffs must aver "a combination of two or more persons to do a criminal act, or to do an unlawful act by unlawful means or for an unlawful purpose." *Ammlung v. City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974); *Panayotides v. Rabenold*, 35 F. Supp. 2d 411 (E.D. Pa. 1999); *Spencer v. Steinman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997). Moreover, the allegations of the conspiracy must be particularized to include:

(1) The period of the conspiracy;

(2) The object of the conspiracy; and

(3) Certain actions of the alleged conspirators taken to achieve that purpose.

*Labalokie v. Capital Area Intermediate Unit*, 926 F. Supp. 503, 508-09 (M.D. Pa. 1996) (citations omitted). In the context of a 12(b)(6) Motion, the Court in *Panayotides* noted as follows:

> Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain other actions of the alleged conspirators taken to achieve that purpose will be deemed sufficient . . . *Dutton*, 1997 WL 732856 at *2 (*quoting*, *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989) (internal citations omitted). Further, "agreement" is the sine qua non of a conspiracy. *Spencer v. Stineman*, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997).

As outlined above, the Complaint is devoid of any facts which indicate that Mr. Wolf's Fourth Amendment rights

were violated in that there is absolutely no evidence of record that anything other than a facially valid warrant was utilized in this search. A § 1983 conspiracy claim is not actionable where there is no actual § 1983 violation. *Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986); *Barkauskie v. Indian River School District*, 951 F. Supp. 519, 539 (D. Del. 1996). Further, even if Mr. Coleman "tipped off the press", which he specifically denies, such does not constitute a criminal act or an unlawful act. The Complaint is devoid of any facts, which establish the existence of a conspiracy or indicate that there was any kind of an agreement between any of the Defendants with regard to the search of Mr. Wolf's office. As the District Court properly determined,

> Plaintiffs fail . . . to allege sufficiently that Defendants engaged in specific instances of conduct based on an agreement or understanding to deprive Plaintiffs of their constitutional rights. Indeed, Plaintiffs made conclusory allegations of conspiracy and, therefore, failed to present sufficient facts to make out a § 1983 conspiracy claim. *Panayotides v. Rabenold*, 35 F. Supp. 2d 411, 420 (E.D. Pa. 1999) (citations omitted).

For these reasons, the District Court and the Court of Appeals, in its review, properly dismissed Wolf's § 1983 conspiracy claim. Petitioners have failed to provide any legitimate basis upon which to grant their Petition for Writ of Certiorari. As such, the Petition must be denied.

### D. COUNT II FAILS TO STATE A CLAIM

In Count II, Plaintiff, Larry Wolf presumably seeks to recover alleged "unpaid legal bills", which are actually the subject of a billing dispute, and apparently claims that his due process and First Amendment rights were somehow violated.

Mr. Wolf's claims to recover unpaid professional fees fail to state a claim for a due process violation. Again, in order to establish a *prima facie* case under § 1983, a Plaintiff must show that Defendants acted under color of state law and that they deprived Plaintiff of a right secured by the Federal Constitution or federal law. *Cuffeld v. Supreme Court of Pa.*, 936 F. Supp. 266, 274 (E.D. Pa. 1996). Moreover, in order to establish a substantive due process claim, a Plaintiff must demonstrate that he or she has a property interest protected by the Fourteenth Amendment Due Process Clause. *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139 (3d Cir. 2000) *citing Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 123 (3d Cir. 2000). In order to state a substantive due process claim, ". . . a Plaintiff must have been deprived of a particular quality of property interest," or an interest which is "fundamental" under the United States Constitution. *Nicholas*, 227 F.2d at 140. Fundamental property interests include those that are, "deeply rooted in the Nation's history and traditions", or are "implicit in the concept of ordered liberty like personal choice in matters of marriage and family." *Woodwind Estates*, 205 F.2d at 142-143. Generally, state created property interests are unworthy of substantive due process protection. *Nicholas*, 227 F.3d at 143.

Mr. Wolf's alleged substantive due process claim in Count II fails to implicate a fundamental property interest or interest worthy of protection. *See Independent Enterprises, Inc. v. Pittsburgh Water & Sewer Authority*, 103 F.3d 1165, 1179 (3d Cir. 1997) (where Court observed that only fundamental property interests are worthy of substantive due process protection). There is no right to receive and/or recover professional fees, which is guaranteed by the Constitution or a federal law and Plaintiff has not alleged otherwise. *Reich v. Beharry*, 883 F.2d 239, 243-244 (3d Cir. 1989) (attorney's interest in avoiding delay in receipt of payment for bill of professional services rendered in

prosecution of county controller was not entitled to substantive due process protection). Rather, Mr. Wolf's claims are either in the nature of a breach of contract, some type of conversion action or other state law claim. As the Third Circuit observed, ". . . because Appellants do not allege violations of protected property interests protected by the Fourteenth Amendment – the threshold question in any substantive due process claim – their claim with regard to Wolf's attorney fees was properly dismissed." (App. 4a (citations omitted)).

Mr. Wolf's First Amendment claim, which is somehow based on Defendants' alleged refusal to pay attorney's fees, likewise fails to state a claim upon which relief can be granted. It is axiomatic that there is no *respondeat superior* liability under § 1983. *Rizzo v. Goode*, 423 U.S. 362, 377 (1978). Rather, as the Supreme Court held in *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978), it is only, ". . . when the execution of the government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983." As the Supreme Court observed:

> Locating a "policy" insures that a municipality is held liable only for those deprivations resulting from the decision of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality as well.

*Board of the County Commissioner of Bryan County, Oklahoma v. Jill Brown*, 520 U.S. 397, 117 S. Ct. 1382, 1388 (1997) (citations omitted). Mr. Wolf must also establish that the alleged municipal action taken was with a reckless degree of culpability and a direct causal link between the municipal action and the deprivation of federal rights. *Id.* While Mr. Wolf has alleged an "objective" of Defendants, there is no allegation of any specific Township policy, practice or custom which directed or caused the deprivation of any federally protected right, particularly a violation of any

First Amendment right. On this basis then, Count II fails to state a claim upon which relief can be granted against Berwick Township.

In addition, Count II fails to state a claim for any violation of Petitioner, Wolf's First Amendment rights pursuant to 42 U.S.C. § 1983. Initially, § 1983 requires state action. Again, Plaintiffs' Complaint is alleged in terms of "objectives". Beyond any allegation that certain individuals had a political agenda, Plaintiffs have not alleged that any official action was taken by any individual in their official capacity.

Further, the Complaint does not state a claim for a First Amendment retaliation claim. In order to establish a § 1983 First Amendment retaliation claim, the Plaintiff has the burden of demonstrating that his or her, ". . . constitutionally protected conduct was a 'substantial' or 'motivating factor' in the relevant decision." *Nicholas*, 227 F.3d at 144. Thereafter, the burden shifts to a Defendant to show, ". . . by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct." *Nicholas*, 227 F.2d at 144.

Count II fails to state a claim for First Amendment retaliation where there is no allegation that whatever activity Mr. Wolf was allegedly denied is a protected activity. There is no allegation that the protected activity was a substantial or motivating factor in any alleged retaliation. Moreover, as the District Court observed, Mr. Wolf has not asserted in Count II, ". . . any constitutionally protected conduct or right that has been deprived by Defendants' . . . refusal to pay Wolf's attorney's fees . . ." (App. 14a). Count II of Plaintiffs' Complaint fails to implicate the First Amendment and, as such, fails to state a claim for either a due process violation and/or a First Amendment violation pursuant to 42 U.S.C. § 1983.

Similarly, any claim of conspiracy based on the deprivation of those rights must fail where a § 1983 conspiracy claim is not actionable where there is no actual § 1983 violation. *Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986); *Barkauskie v. Indian River School District*, 951 F. Supp. 519, 539 (D.E. Del. 1996).

For these reasons, the District Court and Court of Appeals in its review properly dismissed Petitioners' conspiracy claims. Petitioners have failed to provide any legitimate basis upon which to grant their Petition. As such, its must be denied.

### E. THE PROSECUTION OF THE BTMA MEMBERS FOR VIOLATION OF THE SUNSHINE ACT IS NOT A SEIZURE UNDER THE FOURTH AMENDMENT

In Count III, Petitioners, O'Brien, Myers and Hugger allege a malicious prosecution claim based on the Fourth Amendment. Essentially, the Petitioners allege that the violations of the Sunshine Act were brought against them maliciously by Defendants purportedly in retaliation for the Plaintiffs' involvement with the BTMA. The United States Supreme Court has determined that, ". . . a claim of malicious prosecution under § 1983 cannot be based on substantive due process considerations, but instead must be based on a provision of the Bill of Rights providing 'an explicit textural source of constitutional protection.' " *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000) *citing Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807 (1994).

Petitioners fail to set forth how prosecution for violation of the Sunshine Act constitutes either malicious prosecution or a seizure under the Fourth Amendment.

To establish a § 1983 claim for malicious prosecution, the Petitioner must establish: (1) the elements of the common

law tort; and (2) a violation of the Fourth Amendment. The tort has the following elements:

a. The defendant initiated a criminal proceeding;

b. The criminal proceeding ended in the plaintiff's favor;

c. The proceeding was initiated without probable cause; and

d. The defendants acted maliciously or for a purpose other than bringing the plaintiff to justice.

*Merkle v. Upper Dublin School District*, 211 F.3d 783, 791 (3d Cir. 2000). *See also Albright v. Oliver*, 510 U.S. 266, 271 (1994) (petitioner must plead not only the elements of the common law tort, but also a violation of the Fourth Amendment).

Neither Petitioners' brief, nor the Complaint, indicates compliance with elements (b) and (c) above. Respondents simply admit that the District Justice found "against the aforementioned Petitioners." (Petition, pp. 7-8).

Petitioners challenge the District and Appellate Courts' decisions, which found that being prosecuted for Sunshine Act Violations (which were later dismissed) was not a seizure. (Petition, p. 8). Petitioners contend that being forced to attend a trial, without more, is considered a "seizure" under Third Circuit precedent; Petitioners are wrong, as the Court in *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000), noted that whether malicious prosecution is found to be a seizure, depends upon whether the "petitioner's liberty 'was constrained in multiple ways for an extended period of time.' " *Id.* at 792, *citing Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998). The restrictions on plaintiff's liberty in *Gallo* consisted of

the following: "he had to post a $10,000 bond; he had to attend all Court hearings, including his trial and arraignment; he was required to contact Pre-Trial Services on a weekly basis and he was prohibited from traveling outside of New Jersey and Pennsylvania." 161 F.3d at 222. Even though the restrictions in *Gallo* were much more onerous than anything pled in the present case, the Court still held that whether such restrictions amounted to a seizure was "a close question . . ." *Id.*

Petitioners' Complaint alleges no constraint of liberty sufficient to constitute a seizure and Petitioners' brief misstates the Third Circuit precedent on this issue. As such, the Third Circuit Court opinion dismissing this claim must be affirmed.

In addition, as argued above, the Township cannot be liable under § 1983 without a policy, practice or custom identified as the moving force behind the alleged deprivation of a federally protected right. *Monell*, 436 U.S. at 694. On this basis, Plaintiffs' Complaint also fails. Similarly, any conspiracy claim based on the alleged deprivation of the Fourth Amendment right likewise fails. *Barkauskie*, 951 F. Supp. at 539.

### F. COUNT IV FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Presumably, Count IV of Plaintiffs' Complaint attempts to state a cause of action for deprivation of due process and First Amendment rights. Specifically, Plaintiffs, O'Brien, Hugger and Myers claim that they were retaliated against somehow with regard to the BTMA and the aforementioned sewer project. Initially, this Count again fails to state a claim against the Township since Plaintiffs have failed to allege and/or identify any specific policy, practice or custom which was the moving force behind the alleged deprivation of these rights. *Monell*, 436 U.S. at 694.

With regard to the alleged deprivation of a due process right, there is no discernible alleged due process violation. For instance, there is no allegation that Plaintiffs were deprived of property without due process of law. There is no allegation that Plaintiffs were improperly removed from office. Indeed, Plaintiffs apparently were afforded hearings on the Sunshine Act violations and any action with regard to the disputed sewer project was done pursuant to a legal mandamus action. (Comp. at ¶19). Plaintiffs do not, therefore, apparently claim a due process violation as a result of these hearings.

Plaintiffs have not alleged that their liberty interests have been deprived in any way; for instance, Plaintiffs have not alleged any claim for defamation.

To the extent that Plaintiffs allege a substantive due process claim purportedly grounded in their Fourth Amendment malicious prosecution claim, such is not viable. As outlined above, a § 1983 malicious prosecution claim cannot be based on a violation of substantive due process. *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 792 (3d Cir. 2000). Rather, ". . . where a particular amendment provides an explicit textural source of constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims." *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998) (internal quotations omitted).There is no viable claim for an alleged procedural or substantive due process violation. As such, the District Court and the Court of Appeals, in its review, properly dismissed Count IV of Plaintiffs' Complaint on this basis.

With regard to the alleged § 1983 First Amendment retaliation claim, Plaintiffs' Complaint again fails to allege any constitutionally protected behavior, which has been deprived by the Defendants. There is absolutely no allegation that the alleged protected activity was a substantial or motivating factor in any alleged retaliation claim. *See Mt. Healthy City School*

*District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Nicholas*, 227 F.3d at 144.

Similarly, for the reasons stated above, a § 1983 conspiracy must be based on a § 1983 violation. Since Count IV fails to state a claim, any conspiracy claim based on the same likewise fails. Accordingly, the lower Courts properly determined that Plaintiffs failed to state a claim upon which relief could be granted for any alleged due process or First Amendment violation in Count IV of their Complaint. These Orders must be affirmed.

## G. DISTRICT ATTORNEY GEORGE IS ENTITLED TO ABSOLUTE IMMUNITY

District Attorney George is entitled to absolute immunity for his involvement in permitting the application for the search warrant and in prosecuting Petitioners for violation of the Sunshine Act.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that prosecutors enjoy absolute immunity from civil damages under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case." *Id.* at 431. The preparation and filing of support information for a warrant and the determination that the evidence is sufficient to justify a probable cause finding are all protected by absolute immunity. *Kalina v. Fletcher*, 118 S. Ct. 502, 505, 510 (1997).[5]

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5. While Petitioners rely on *CPC v. State Ethics Commission*, 698 A.2d 155 (Pa. Cmwlth. 1997), presumably for the proposition that the State Ethics law was inapplicable to Attorney Wolf, the fact remains, as purportedly alleged, that D.A. George, who enjoys absolute immunity, made the decision to initiate prosecution and to prepare and to file support information for a warrant, and also made the determination that the facts at bar were sufficient to satisfy probable cause. These functions are all protected by absolute immunity. *Kalina v. Fletcher*, 118 S. Ct. at 505, 510.

District Attorney George also enjoys immunity for prosecuting Petitioners for violating the Sunshine Act, as prosecutorial immunity covers "the professional evaluation of the evidence assembled by the police and appropriate preparation . . . at trial . . ." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993); *Burns v. Reed*, 500 U.S. 478, 492 (1991). Such immunity covers a prosecutor's decision regarding which cases to file, *Elder v. Athens Clarke County*, 54 F.3d 694, 695 (11th Cir. 1995), and whether to prosecute at all. *Roe v. San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997). It also protects a prosecutor's request that "the Court enter an Order of *nolle pros equi* . . ." *Brooks v. George County*, 84 F.3d 157, 168 (5th Cir.) *cert. denied*, 117 S. Ct. 359 (1997).

In Petitioners effort to cast District Attorney George's role in the prosecution of the Sunshine Act or preparation of the search warrant as "investigatory," they misstate the facts pled in the Complaint. For example, Petitioner's brief states: "George prepared a search warrant application [Affidavit] for O'Brien that alleged that Wolf was covered by the Ethics Act when he knew he was not." (Petition, p. 7). Petitioners also state "Mr. George prepared the search warrant application and had O'Brien sign it. He did the purported investigation and he applied for the search warrant." *Id.* at 8. Finally, Petitioners state that District Attorney George "didn't wear his D.A. hat to prosecute this Complaint – he acted as a lawyer [though Petitioners note] . . . the record [on this point] is perhaps at best, ambiguous . . ." *Id.* at 8-9.

Petitioners' claim regarding George's role in either the search warrant or Sunshine Act prosecution is not supported by any section of the Complaint. In fact, the District Court noted that the Affidavit of Probable Cause was not prepared or signed by District Attorney George, but in fact was prepared by Detective O'Brien. (App. 17a-18a). Further, George's role in the Sunshine Act violation was to prosecute – something afforded immunity, notwithstanding

Petitioner's effort to ascribe some nefarious role to the prosecution. Thus, George is absolutely immune from all claims related to the search warrant. The District and Appellate Courts' ruling in this regard must be affirmed.

## H. THE INDIVIDUAL RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY

The District Court and the Third Circuit properly concluded that the Respondents are entitled to qualified immunity from the Petitioners' claims. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court created an objective reasonableness test for analyzing the qualified immunity defense. The Court held in *Harlow* that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights on which a reasonable person would have known." *Id.* The qualified immunity inquiry focuses on whether a reasonable governmental official could believe that his conduct was lawful, in light of clearly established law and the information in the official's possession. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This Court has also noted that the qualified immunity defense "gives ample room for mistaken judgments" and provides ample protection to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341-343 (1986); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Although the issue is often addressed on summary judgment, "qualified immunity questions" should be resolved at the earliest possible stage of the litigation. *Anderson*, 483 U.S. at 646, n.6. Thus, if the wrongful conduct alleged is that which a reasonable official could have believed lawful, dismissal is appropriate before discovery. *See, Id.*

In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), this Honorable Court refined the qualified immunity standard. As a threshold matter, the District Court must consider whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Id.*, 121 S. Ct. at 2155. If the allegations do not establish the violation of a constitutional right, then the governmental official is entitled to qualified immunity. *Id.* at 2156.

After a careful review of the record, both the District Court and the Third Circuit concluded that Plaintiffs' Complaint had not alleged any cognizable constitutional claims. Both the District Court and the Third Circuit concluded that Plaintiffs were not entitled to any relief on the § 1983 claims arising out of: the refusal to pay Petitioner Wolf's legal fees; the search of Petitioner Wolf's law office; the prosecution of Petitioners O'Brien, Meyers and Hugger for violation of the Sunshine Act; Petitioners' substantive due process claims; and the § 1983 conspiracy claims. Clearly, the courts below applied the correct legal standard in evaluating the qualified immunity defense and properly concluded that Plaintiffs had not alleged any facts establishing that the Respondents' actions deprived them of any federally protected right.

Petitioners' claims against Respondent Wilson arise solely out of the execution of the search warrant at Attorney Wolf's office on May 22, 1998. In the proceedings below, Respondent Wilson maintained that he was immune from liability as a matter of law because his sole involvement in this case was the participation in the execution of a facially valid search warrant which was approved by the Adams County District Attorney's office and by District Justice Dubs, a detached and neutral magistrate.

In *United States v. Leon*, 468 U.S. 897 (1984), the court held that inadequate probable cause does not necessarily

render a warrant facially invalid nor prevent reasonable belief in the existence of probable cause. Moreover, *Leon* emphasized that generally an officer cannot be expected to question the Magistrate's probable cause determination. Respondent Wilson was not the affiant on the probable cause affidavit but merely executed the search warrant approved by the District Justice. Under these circumstances, the courts below properly concluded that Respondent Wilson was immune from liability as a matter of law on Petitioners' Fourth Amendment claims.

In their Petition for Writ of Certiorari, Petitioners assert that the Third Circuit Panel had to address and consider the holdings in *Wilson v. Layne*, 526 U.S. 603 (1999) and *Hanlon v. Berger*, 526 U.S. 808 (1999). Both of those cases address the issue of whether media involvement in the execution of a search warrant implicates the Fourth Amendment. Plaintiffs' reliance on *Wilson* and *Hanlon*, however, is misplaced. It is important to note that the search warrant at issue in this case was executed on May 22, 1998, which was prior to the Court's rulings in *Wilson* and *Hanlon* in 1999. Petitioners have not, and cannot cite to any case law decided prior to May, 1998 in which it held that media involvement in the execution of a search warrant violated the Fourth Amendment. Since the law was not clearly established at the time the Respondents executed the search warrant, qualified immunity applies.

## CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court deny Petitioners Petition for a Writ of Certiorari.

Respectfully submitted,

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